Filed 4/22/19 Marugg v. Dept. of Justice CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KIM MARUGG, Plaintiff and Appellant, v. DEPARTMENT OF JUSTICE et al., Defendants and Respondent.	D074249 (Super. Ct. No. 37-2017-00027519-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

Law Office of James Byrnes and James Byrnes for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Chris A. Knudsen, Assistant Attorney General, and Christine Mersten, Deputy Attorney General, for Defendants and Respondent.

Plaintiff Kim Marugg, a former employee of the Department of Justice (DOJ), appeals an order and judgment of dismissal thereon sustaining without leave to amend the demurrer of individual defendants Spring Robbins and Arwen Flint (sometimes collectively, defendants) to plaintiff's first amended complaint (FAC). Plaintiff in her

FAC brought claims pursuant to title 42 United States Code section 1983 (hereinafter, section 1983) against defendants for their alleged violation of her constitutional rights. Specifically, plaintiff alleges she was deprived of her federal rights under the Fourteenth and First Amendments (first and second causes of action, respectively) *not* because appointing power DOJ failed to offer her due process or the right to redress her grievances after terminating her employment, but because investigator Robbins and former chief of human resources Flint in the course and scope of their official duties allegedly conspired against her in their investigation that led to plaintiff's termination from DOJ.

On appeal, plaintiff contends the court erred in sustaining the demurrer without leave to amend because she alleged sufficient "factual" allegations in her FAC to show "her constitutional rights were violated when Robbins and Flint knowingly relied on false evidence and incomplete records, refused to correct inaccuracies, failed to obtain relevant records and suppressed significant exculpatory evidence in their investigation and termination of [plaintiff]." She further contends the court erred in ruling that Robbins and Flint were entitled to qualified immunity under the Government Code.[1]

As we explain, we independently conclude as a matter of federal law that plaintiff cannot state a section 1983 claim for violation of procedural due process under the Fourteenth Amendment based on allegations defendants were biased against her, or

---

1 Unless noted otherwise, all additional statutory references are to the Government Code.

otherwise had some sort of "agenda," which was incompatible with the truth-seeking investigation they conducted on behalf of DOJ.

We further independently conclude that plaintiff cannot state a section 1983 claim under the First Amendment because her speech or petitioning activity did not under federal law involve a matter of public concern, and that plaintiff, in any event, had more than adequate access to the courts and/or various administrative procedures to redress her grievances. Affirmed.[2]

LEGAL STANDARD

A. *Principles Governing a Demurer to a Section 1983 Claim*

It is axiomatic that a "demurrer tests the legal sufficiency of the complaint." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) We review de novo a judgment of dismissal based on a sustained demurrer. (*Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1091 (*Doan*).) We will reverse the judgment of dismissal if the allegations of a complaint state a cause of action "under any legal theory." (*Ibid.*)

---

[2] Based on our decision, we find it unnecessary to reach the issue of whether defendants were entitled to qualified immunity under section 821.6, despite the fact plaintiff alleges they were acting in the course and scope of their official duties while conducting on behalf of DOJ their internal affairs investigation of plaintiff. (§ 821.6 [providing a "public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause"]; see *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209–1210 [noting the scope of section 821.6 is not limited to the filing of a criminal complaint, but "extends to actions taken in preparation for formal proceedings," and further noting that "[b]ecause investigation is 'an essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity' "].)

As particularly relevant in the instant case, we assume the truth of all properly pleaded facts alleged in the FAC, including those subject to judicial notice, but *not* conclusory factual or legal allegations contained in the complaint. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [treating a demurrer as " ' "admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law" ' "].)

To the "extent the factual allegations conflict with the content of the exhibits to the complaint [or matters judicially noticed], we rely on and accept as true the contents of the exhibits" and ignore the conflicting allegations. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 (*Barnett*).) Litigants may allege inconsistent theories but not inconsistent facts (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 827–828), and "[s]pecific factual allegations modify and limit inconsistent general statements." (*B & P Development Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; see also *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 549 [same].)

"The rules to be applied in evaluating a demurrer on a section 1983 cause of action were laid out in *Bach v. County of Butte* (1983) 147 Cal.App.3d 554. … '[T]he state courts of California should apply *federal law* to determine whether a complaint pleads a cause of action under section 1983 sufficient to survive a general demurrer.' (*Id.* at

p. 563, fn. omitted[, italics added].) For the purposes of a demurrer to 'a section 1983 complaint, the allegations of the complaint are generally taken as true. [Citation.]' (*Ibid.*, fn. omitted.) When a section 1983 complaint is prepared by counsel, ' "[t]he controlling standard . . . is that an action may be dismissed for failure to state a claim only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief.' " However, a pleading is insufficient to state a claim under the Civil Rights Act if the allegations are mere conclusions. [Citations.] Some particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action under the Civil Rights Act. [Citations.]' ([*Id.* at p. 564].)" (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 891 (*Catsouras*).)

B. *Judicial Notice*

The record in the instant case shows both parties separately filed a request for judicial notice in connection with defendants' demurrer to the FAC. As relevant here, defendants requested the court take judicial notice of the following items: (i) the August 9, 2016 Notice of Adverse Action (NAA) dismissing plaintiff from DOJ; (ii) plaintiff's September 12, 2016 appeal of the NAA to the State Personnel Board (Board); (iii) the Board's notice calendaring the evidentiary hearing of plaintiff's appeal for March 7–10, 2017; (iv) the Board's March 7, 2017 notice vacating the evidentiary hearing after plaintiff abandoned her appeal on the eve of the four-day hearing; (v) the March 16, 2017 10-page order of the San Diego County Superior Court, case number SCD 160771, denying plaintiff's July 29, 2016 petition for writ of *coram nobis* (sometimes, writ

petition); and (vi) plaintiff's October 17, 2017 opening brief in *People v. Marugg* (D0722065) (*Marugg*) appealing the order denying her writ petition.

Plaintiff, for her part, requested the court take judicial notice of her December 8, 2003 plea of guilty/no contest-misdemeanor (when her last name was Alvarez, as discussed *post*). The court agreed to take judicial notice of all such documents, which ruling neither party challenges on appeal.

FACTUAL BACKGROUND

A. *Allegations in the FAC and Facts Judicially Noticed*[3]

In 2002, a grand jury indicted plaintiff of four counts of conspiracy under former Penal Code section 182, subd. (a)(1), 14 counts of violation of former Insurance Code section 11880, subdivision (a), and five counts of violation of Unemployment Insurance Code section 2117.5. Plaintiff's former husband Jose Alvarez was also indicted in 2002 by the grand jury. The case against plaintiff and Jose was prosecuted by Deputy District Attorney Ernest Marugg (DDA Marugg), whom plaintiff ended up marrying in June 2010 after divorcing Jose in 2004.

In December 2003, plaintiff pleaded guilty to a misdemeanor count of conspiracy to misrepresent a fact. "Per the plea agreement, [plaintiff] would not face any jail time and the balance of the charges filed against her were dismissed." Plaintiff's FAC alleges that in August 2010, an internal affairs investigation began of DDA Marugg "regarding

---

3 As discussed *post*, plaintiff's FAC contains myriad contentions, deductions, and/or conclusions of fact or law that cannot be considered in determining whether she has stated any valid cause of action. (See *Yvanova*, *supra*, 62 Cal.4th at p. 924.)

his inappropriate relationships with former criminal defendants, including plaintiff"; that this investigation was conducted by the San Diego District Attorney's Office (DA) and/or the Attorney General's Office (AG); that others beside plaintiff and her former husband had been wrongfully prosecuted by DDA Marugg and had successfully moved to expunge their convictions; that due to "significant media coverage," DOJ was notified for a second time of plaintiff's 2003 misdemeanor conviction, the first being in 2007 when she "filled out the background check paperwork" before beginning employment at DOJ; and that in mid-September 2014, plaintiff went out on medical leave.

About a month after taking medical leave, plaintiff's supervisor received an anonymous letter "stating plaintiff was failing to account for time absent from work." The FAC alleges that plaintiff in early January 2015 was notified she was the subject of an "Internal Affairs Investigation" (sometimes, IAI) for not reporting time off. "Thereafter additional allegations were added [against plaintiff, including that] she had committed plagiarism [of] a writing sample and personal use of her computer." After returning to work in April 2015, "plaintiff received yet another letter informing her of an additional allegation being added to her IAI, specifically that she had omitted her [2003] conviction from her DOJ employment application."

The FAC alleges while DOJ's IAI of her was ongoing, plaintiff in July 2016 filed her writ petition "to correct the judgment against her based on the fundamental error of prosecutorial misconduct" by DDA Marugg, who had died in October 2013 while married to plaintiff. (See *Marugg, supra,* 2018 WL 4057727 at *7.) In connection with

her petition, plaintiff in part relied on a 2011 declaration by DDA Marugg in which he stated plaintiff's factual innocence.

While her writ petition was pending, DOJ advised plaintiff she had been placed on administrative time off, provided her with two file folders of documents pertaining to the IAI, and served her with the 25-page NAA. The NAA informed plaintiff of her right to (1) respond pre-termination to the "Appointing Power" (i.e., DOJ) in accordance with the Board's *Skelly*[4] rules; and (2) file post-termination with the Board a written answer to the NAA, which answer would "be deemed to be a request for hearing or investigation" as set forth in section 19575.[5] As noted *ante*, plaintiff appealed her termination from DOJ to the Board, which she later dismissed prior to hearing.

On March 16, 2017, the court denied plaintiff's writ petition both on procedural grounds and on the merits. Regarding the former, the court found plaintiff failed to act

---

4 *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*); *Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 280 [noting the *Skelly* court's directive "gave rise to an administrative procedure known as a *Skelly* hearing, in which an employee has the opportunity to respond to the charges upon which the proposed discipline is based"].)

5 Section 19575 provides: "The employee has 30 calendar days after the effective date of the adverse action to file with the board a written answer to the notice of adverse action. The answer shall be deemed to be a denial of all of the allegations of the notice of adverse action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified *or after answer withdraws his or her appeal the adverse action taken by the appointing power shall be final*. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power." (Italics added.)

with " 'due diligence' " as she waited about 13 years to file the petition, which the court found was based on evidence that was known to her, or, through the exercise of reasonable diligence, should have been known to her, long ago.

Regarding the latter, the court found that "much of the evidence" plaintiff presented was "hearsay" and/or was an attack on a witness's credibility, which were " 'matters commonly adjudicated on a motion for new trial, or on an appeal from an order denying a new trial, or from the judgment, and [were] not matters reviewable by [the writ petition].' "

The court also found plaintiff's "romantic relationship" with DDA Marugg did not "impact[] her decision to pled guilty" in 2003. Specifically, the court noted that, despite "numerous declarations in support of this Petition, nowhere in said declarations does [plaintiff] provide a specific date when her personal relationship with [DDA] Marugg began. She also does not state said relationship began prior to [her] entry of the guilty plea. To the contrary, in the Petition, [plaintiff] states that her romantic relationship with DDA Marugg commenced after the criminal case. Further, even if [her] relationship with DDA Marugg began after she entered the guilty plea, [plaintiff] still has not shown how said relationship changed the facts of her criminal case." At the time of her filing the FAC, plaintiff's appeal of the order denying her writ petition was pending in this court.[6]

---

6 In August 2018, this court affirmed in part, and reversed in part, the court's order denying plaintiff's writ petition. (*Marugg, supra*, 2018 WL 4057727 at *1–2.) We agreed with the court's determination that plaintiff was not entitled to *coram nobis* relief, but concluded the court at a minimum was required to hold a hearing before denying her relief under (former) Penal Code section 1473.7, subdivision (d). (*Marugg*, at *1–2.)

Plaintiff in her FAC alleged the NAA describing various categories of misconduct by her was based on myriad "forgeries and altered documents" (emphasis omitted); that a petition for expungement she filed in 2007 but never pursued had been "falsely altered in an attempt to portray plaintiff's [2003] conviction as a felony, to support . . . investigator Spring's allegation that plaintiff fraudulently obtained her position at . . . DOJ" (emphasis omitted); that Robbins "failed to examine all the evidence at her disposal and did not conduct a further investigation when faced with conflicting information"; that this same investigator "ignored substantial exculpating evidence, failed to obtain complete relevant records, and relied on forged and altered documents"; and that at a settlement conference held in November 2016 pertaining to her appeal to the Board, an administrative law judge (ALJ) allegedly recommended plaintiff be reinstated and given a 10-day suspension, which Flint, as former chief of DOJ's human resources department, rejected on the basis plaintiff's 2003 conviction "was one of moral turpitude, i.e., false statement pertaining to Workers[']Compensation."[7]

Plaintiff's FAC further alleged it was "unclear" if Flint "ever accepted the reality that plaintiff did not have a felony violation on her record"; that in signing the NAA, Flint

---

7 Defendants in their opening brief argue in passing that it was "inappropriate" for plaintiff to include statements in the FAC from the settlement conference because such statements are inadmissible. (See Evid. Code, § 1152, subd. (a) [providing "statements made in negotiation" of a compromise of a claim of loss are "inadmissible to prove his or her liability for the loss"].) We need not resolve that specific issue because as noted *post*, we conclude such allegations are not properly pleaded facts that can be considered in determining whether plaintiff's FAC states any cause of action. (See *Yvanova*, *supra*, 62 Cal.4th at p. 924 [noting a demurrer only admits properly pleaded facts, not mere contentions, deductions or conclusions of fact or law].)

"ignor[ed] forgeries and corrected information, in favor of inaccurate information" (fn. omitted); and that plaintiff thereafter pursued "administrative remedies and [the Equal Employment Opportunity Commission (EEOC)] provided [her] a right to sue letter" in April 2017.

With respect to this latter allegation, plaintiff in a footnote in her FAC alleged as follows: "Defendants make much ado about plaintiff abandoning her . . . appeal [to the Board] *but that was her right*. Plaintiff pursued and exhausted her administrative remedies by filing [under the Fair Employment and Housing Act (FEHA)] and EEOC and receiving a Right to Sue letter." (Italics added.)

As noted, plaintiff's first cause of action alleged a "deprivation" under section 1983 of her Fourteenth Amendment procedural due process rights. In this cause of action, plaintiff reiterated many of the general allegations in the FAC, including that defendants "intentionally and knowingly relied on forged and altered documents, incomplete records, [and] misinformation . . . in investigating plaintiff, filing and signing off on her Adverse Action and firing and refus[ing] to reinstate plaintiff as recommended by the ALJ"; that "Robbins and Flint were acting or purporting to act in the performance of their official duties"; that under *Skelly*, plaintiff had a property right in "civil service employment" that could not be taken away absent due process, "which plaintiff failed to receive"; that as a "direct and proximate result of defendant[s]' actions," plaintiff suffered harm "including lost earnings and other employment benefits, humiliation, impairment of reputation, embarrassment and mental anguish all to her damage"; and that defendants

"acted knowingly, willfully and with reckless and callous disregard for plaintiff's federally protected rights."

Plaintiff in her second cause of action alleged a deprivation of her right to "petition the government for redress of grievances" as provided under the First Amendment. Specifically, in this cause of action plaintiff alleged both "DOJ and [the] DA were aware that plaintiff intended to pursue her factual innocence and bring a lawsuit based on her wrongful [2003] conviction"; that the "year and a half IAI of harassing investigation of plaintiff by defendant Spring Robbins, initiated by an anonymous letter and based on forged and altered documents, incomplete records, exclusion of exculpating evidence, etc., were attempts to prevent plaintiff from engaging in protected speech, i.e., petition to redress grievances in suing the DA, with whom . . . DOJ had close connections"; that plaintiff's filing of her July 2016 writ petition prompted defendant Flint to serve plaintiff with the NAA in August 2016; that plaintiff's filing of the writ petition "was the protected activity, i.e., her Constitutional right to petition the government for redress of grievances, for which she was retaliated against by defendant Flint's intentional and unlawful termination"; and that, as a "public employee, plaintiff engaged in protected speech, i.e., filing of the [w]rit [petition], (and assertions to individuals in the DA's office, that she was intent on vindicating her rights via a lawsuit for wrongful prosecution against the DA), which addressed a matter of public concern, i.e., recurring government misconduct in prosecutions" by her deceased husband.

Plaintiff's second cause of action reiterated that "Robbins and Flint were acting in the performance of their official duties"; that as a result of their actions, plaintiff suffered

harm, as also alleged *ante* in her first cause of action; and that defendants acted "knowingly, willfully and with reckless and callous disregard for plaintiff's federally protected rights." Plaintiff in her prayer for relief sought general and special damages, attorney fees, and costs of suit.

B. *Court's Ruling*

In sustaining defendants' demurrer to the FAC without leave to amend, the court ruled in part as follows: "The FAC fails to plead sufficient facts in count one to support a [section] 1983 claim. The pleading does not specify how defendant's personal conduct 'subjected the plaintiff to a deprivation of constitutional rights.' (*Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir. 1976). In a [section] 1983 claim, case precedent has supported a higher degree of specificity in pleadings. 'Conclusory allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.' *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). The plaintiff must 'allege with at least some degree of particularity overt acts which defendants engaged in' that support the plaintiff's claim. *Id.*, quoting *Powell v. Workmen's Compensation Board*, 327 F.2d 131, 137 (2d. Cir. 1964)."

The court also ruled plaintiff had improperly asserted a second cause of action based on her failure to seek leave of court prior to filing the FAC. In any event, the court found the second cause of action also failed to state a cause of action under federal law, noting: "It fails to plead sufficient facts showing how the defendants specifically denied the plaintiff her right to petition, when the judicially noticed papers in this action show that the plaintiff has had ample opportunity to petition the government. [Citation.] She

even acknowledges she 'was given the opportunity to show the government's case was untrue.' [Citation.] Plainly, this is a lawsuit in search of a theory. This former DOJ legal secretary has had extensive access to administrative procedures and to the courts. That she is dissatisfied with the outcome does not perforce translate into a valid claim against investigators who proceeded in good faith and discovered numerous grounds to terminate her employment."

Regarding its decision not to grant plaintiff leave to amend the FAC, the court stated: "*Plaintiff has not expressly requested leave to amend*, and it is ordinarily an abuse of discretion to deny such a request unless the inability to state a valid cause of action is clear. In this respect, plaintiff has the burden to show in what manner she can amend counts one and two of the FAC and how the amendment will change the legal effect of the pleading. [Citation.] *She makes no effort to comply with this requirement*. In light of this and the fact that leave to amend was already granted once, the court must assume plaintiff has put her best foot forward. The demurrer is sustained without leave to amend." (Italics added.)

DISCUSSION

I

Section 1983

To be actionable, a claim under section 1983 requires a deprivation of a federal right. Section 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

A. *The FAC Asserts Myriad Improper Allegations*

As defendants correctly point out, myriad allegations in plaintiff's FAC constitute improper contentions, deductions, or conclusions of fact or law that cannot be considered in determining whether the FAC states any valid cause of action. (See *Yvanova*, *supra*, 62 Cal.4th at p. 924; *Doan*, *supra*, 195 Cal.App.4th at p. 1091 [judgment of dismissal will be reversed if a complaint's allegations state a cause of action "under any legal theory"].)

Such allegations include (by way of example only):[8]

* ¶ 12 [plaintiff's "courthouse copy" of a 2007 petition for expungement of her 2003 conviction — which was not attached to her FAC or the subject of judicial notice — "was altered to falsely indicate that plaintiff's conviction was a felony"];

* ¶ 16 ["All law enforcement agencies have to work together to be effective"];

* *Ibid.* ["Further connections between the DA and DOJ are evidenced by an exchange program the DA has with the DOJ"];

* ¶ 21 ["Both [third-party Tamara] McAnally and plaintiff were prosecuted by DDA Ernie Marugg, for the same alleged crimes, with their husbands as co-defendants, despite DDA Marugg's knowledge of their innocence"];

* ¶ 24 ["Since the DOJ had two instances of notice of plaintiff's misdemeanor conviction, i.e., in 2007 and 2011, they were not only precluded from pursuing this issue in [its] 2015 internal affairs investigation — but more egregiously from relying solely upon that misdemeanor conviction for plaintiff's termination — due to the 3-year statute of limitation under Cal.Gov. Code § 19635"];

---

8 Although the foregoing list of improper allegations is impressive, it is by no means exhaustive.

* ¶ 34 ["Plaintiff's supervisor testified that the handwriting [on plaintiff's timesheets from July to September 2014] did not match plaintiff's, nor was [plaintiff] available to fill out September's time sheet," which timesheets were "[o]ne of a number of *forgeries and altered documents* improperly relied upon on in the Internal Investigation"];

* ¶ 38 ["Thus of the 43 instances of unaccounted absences for the 3-month period referenced in the [NAA], *11 represented forgeries* on the September time sheet"];

* ¶ 40 ["The methods used by the DOJ to record attendance are flawed"];

* *Ibid.* ["Neither plaintiff nor her coworkers were aware [that DOJ used access cards] to monitor workers" from DOJ, which use "is in violation of the Union contract and policy"];

* ¶ 41 ["During plaintiff's IAI interviews in April 2015 plaintiff was shown an altered record of her Petition for Expungement that had been filed (but never pursued) in Superior Court," which "[d]ocument not only had the checked misdemeanor box scratched out, but also had boxes checked for felony and felony capable of being reduced to a misdemeanor"];

* ¶ 42 ["The court document [of the expungement petition] was *falsely altered* in an attempt to portray plaintiff's conviction as a felony, to support . . . Investigator Spring's allegation that plaintiff fraudulently obtained her position at the DOJ," italics added.];

* ¶ 43 ["An email [that was not attached to the FAC or subject to judicial notice] from Probation Officer Sean Cole to investigator Spring Robbins similarly has an incorrect disposition, i.e., felony conviction, on the Juris report"];

* ¶ 45 ["The investigator, Spring Robbins, failed to examine all the evidence at her disposal and did not conduct a further investigation when faced with conflicting information"];

* *Ibid.* ["Investigator Robbins ignored substantial exculpating evidence, failed to obtain complete relevant records, and relied on forged and altered documents, such as the September time sheet and Petition for Expungement"];

* ¶ 46 ["In plaintiff's Pre-Hearing Settlement Conference November 9, 2017 [*sic*], pertaining to a potential appeal of her dismissal to the . . . Board, the [ALJ] recommended Plaintiff's reinstatement and a 10-day suspension (which already had been served)"];

* ¶ 47 ["However, Arwen Flint . . . declined the ALJ's decision, on the basis that the underlying crime was one of moral turpitude, i.e., false statement pertaining to Worker's Compensation"];

* *Ibid.* ["It is unclear if Mr. [*sic*] Arwen [*sic*] ever accepted the reality that plaintiff did not in fact have a felony conviction on her record"];

* *Ibid.* ["The ALJ informed plaintiff that 'regardless of what it [i.e., the conviction] was the other side's position is that it was a crime of moral turpitude' "];

* ¶ 48 ["Yet the basis for terminating plaintiff was precluded by the running of the 3-year statute of limitations under GC§19635"];

* ¶ 49 ["Mr. [*sic*] Flint also signed plaintiff's flawed [NAA], ignoring forgeries and corrected information, in favor of inaccurate information" (fn. omitted)];

* ¶ 52 ["Investigator Spring Robbins did not adequately examine evidence at her disposal, failed to conduct further investigation when faced with conflicting information, failed to obtain complete relevant records, included forgeries and altered documents and ignored substantial exculpating evidence in her investigation"];

* ¶ 56 ["The allegations in the [NAA] that plaintiff knowingly and falsely represented her criminal history is the most egregious example of Investigator Robbin's intentional dishonesty and animus toward plaintiff"];

* ¶ 58 ["The reason plaintiff's conviction is the centerpiece of the [NAA] is that ultimately defendant Flint rejected the ALJ's recommendation for reinstatement, based on her misdemeanor conviction, despite the fact that the conviction was remote in time, . . . and was an insignificant misdemeanor conviction . . . and, most importantly, was precluded by GC§19635"];

* ¶ 61 ["The alleged plagiarism occurred when plaintiff created a writing sample [to apply for a new position with DOJ, when she] cut and pasted from a case[] filed in court on 3/14, that was a public record," which conduct is allowed as the "ABA has noted it is appropriate to copy from the work of other lawyers in preparing pleadings and briefs . . . and that . . . [s]uch copying is not viewed as a type of fraud or misrepresentation"];

* ¶ 62 ["Arwen Flint . . . exacerbated the many failings in investigator Robbin's work, (failure to examine evidence at her disposal, failure to conduct further investigation when faced with conflicting information, failure to obtain complete relevant records, reliance on forged and altered documents and the ignoring of substantial exculpating evidence), by signing off the defective [NAA] and declining to follow the [ALJ's]

recommendation of reinstatement, despite the knowledge that issues alleged in the [NAA] had neither been properly investigated nor resolved and that there were blatant forgeries in critical documents directed against plaintiff"]; and

* ¶ 65 ["Defendants Robbins and Flint intentionally and knowingly relied on forged and altered documents, incomplete records, misinformation, and ignored exculpatory evidence in investigating plaintiff, filing and signing off on her [NAA] and firing and refus[ing] to reinstate plaintiff as recommended by the ALJ"].

B. *Due Process*

1. Federal Law

As noted *ante*, we apply federal law in determining whether plaintiff's cause of action for deprivation of due process survives demurrer. (See *Catsouras, supra*, 181 Cal.App.4th at p. 891.) The recently decided case of *Constantino v. Southern Humboldt Unified School District* (N.D.Ca. 2019) 2019 WL 201565 (*Constantino*), involving circumstances similar to those in the instant case, provides meaningful guidance on this issue.

In *Constantino*, the defendants school district (district), school district employee O'Sullivan (O'Sullivan), and others successfully moved to dismiss the operative complaint of plaintiff Constantino, a 17-year permanent employee of district who had no prior history of discipline and who had "received consistently good performance evaluations." (*Constantino*, *supra*, 2019 WL 201565 at *1.) The plaintiff alleged district hired O'Sullivan in 2015 as a school counselor. O'Sullivan had no supervisory authority in this position. However, O'Sullivan was the daughter of the president of the district's school board. (*Ibid.*)

An issue arose between O'Sullivan and the plaintiff regarding whether a district student could participate in independent study while living outside the United States. (*Constantino, supra*, 2019 WL 201565 at *1–2.) The plaintiff alleged that as a result of this dispute, O'Sullivan began directing her to perform certain tasks in connection with this student, believing it was "illegal" to give independent work study to an unenrolled student (*id.* at *2); and that O'Sullivan began to treat her as if she was "defying orders" of O'Sullivan. (*Ibid.*)

As time went on, the relationship between the plaintiff and O'Sullivan became even more strained. (*Constantino*, *supra*, 2019 WL 201565 at *2.) The plaintiff first took her concerns to the school principal, who, according to the plaintiff, refused to get involved. She next went to the district's superintendent, defendant Scott. The plaintiff alleged that, because O'Sullivan was the daughter of the president of district's school board, Scott determined that O'Sullivan wanted the plaintiff "gone" and thus, together they "colluded to cause the termination of [the p]laintiff's employment" from district. (*Ibid.*). The plaintiff further alleged that Scott instructed O'Sullivan to issue two written and false reprimands to the plaintiff. (*Ibid.*) When the plaintiff sought to appeal the "falsified reprimands" to the school principal, the principal disclosed that Scott had instructed him not to discuss the matter with the plaintiff (*id.* at *3); and that, in any event, he was "not in a position to do anything about it because he feared retaliation from Defendant Scott" (*ibid.*), despite his knowledge the reprimands of the plaintiff were "unfounded." (*Ibid.*)

In March 2016, Scott informed the plaintiff and another district employee that district intended to lay them both off. (*Constantino*, *supra*, 2019 WL 201565 at *3.) The plaintiff alleged the layoff was a "pretext to terminate [her] employment in violation of her rights to continued employment and protection against termination except for cause." (*Ibid.*) Over the next several months, Scott pressured the plaintiff to accept an offer to retire early and "waive her rights under the California Education Code and the collective bargaining agreement to seek re-employment." (*Id.* at *4.)

In spring 2016, district created a new clerical position. Both the plaintiff and the other district employee facing layoff interviewed for the position. (*Constantino*, *supra*, 2019 WL 201565 at *3.) The plaintiff alleged after the interviews, one of the members of the interview panel "apologiz[ed] for what the panel member felt was a pre-determined and unfair process" (*ibid*), claiming other panel members had made up their minds to hire the other district employee instead of plaintiff before the interviews had commenced. Realizing that she had "no realistic option but to enter into early retirement" (*id.* at *4), the plaintiff accepted district's offer. (*Ibid.*)

The plaintiff alleged in late fall 2016, she was told by a vice-principal of her former school that her "layoff was illegitimate and not bona fide" (*Constantino*, *supra*, 2019 WL 201565 at *4), and that O'Sullivan and Scott "had conspired to terminate her employment because they simply did not like her and the culture they accused her of having created in the school's counseling office." (*Id.* at *11.) The plaintiff filed a written complaint to district, which was attached as an exhibit to plaintiff's operative complaint. District in response hired outside counsel to conduct an investigation, which

resulted in a report that was also attached as an exhibit to the complaint. (*Id*. at *11–12.) The plaintiff thereafter sought reinstatement and back pay, which district rejected. (*Id.* at *12.)

Similar to the instant case, the plaintiff's first cause of action in *Constantino* was based on section 1983 and what the plaintiff there claimed was a deprivation of procedural due process because the defendants had engaged in an unfair and fraudulent investigation of her because they did not like her, ultimately forcing the plaintiff to take early retirement from district. (*Constantino, supra*, 2019 WL 201565 at *7.) The defendants in *Constantino* filed a motion to dismiss (Fed. Rules Civ. Proc., rule 12(b)), the federal equivalent to a demurrer under Code of Civil Procedure section 430.10. The court granted the motion without leave to amend.

In analyzing this issue, the court in *Constantino* recognized a section 1983 claim for deprivation of due process "has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). It is well established that '[d]ue process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [governmental] action and afford them an opportunity to present their objections.' *Al Haramain Islamic Foundation., Inc. v. U. S. Dep't of the Treasury*, 686 F.3d 965, 985 (9th Cir. 2012), quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010).

"As stated above, Plaintiff claims that Defendants could not lawfully terminate her employment without cause. Plaintiff claims that Defendants Scott and O'Sullivan conspired to terminate her employment, and acted with deliberate and reckless indifference towards her rights, in violation of her constitutionally protected right to Due Process under the Fourteenth Amendment. The only reference in the [operative c]omplaint to any potential procedural issue is Plaintiff's allegation that Defendants could not lawfully terminate her employment without notice of the proposed action, a statement of the reason(s) thereof, and a hearing. [Citation.] There are there no more detailed allegations as to what particular 'process' Plaintiff was due. Defendants argue that these allegations are conclusory and fail to meet the plausibility standard set forth in [*Ashcroft v.*] *Iqbal* [(2009)] 556 U.S. [662,] 678 [(*Iqbal*)]. …

"In response to Defendants' argument that she has not stated a claim for violation of her right to procedural due process, Plaintiff provides the following: 'Defendants terminated Plaintiff's employment giving her neither notice nor a hearing to which she was legally entitled. Defendants should have notified Plaintiff they intended to terminate her because O'SULLIVAN did not like her (i.e., the real reason for the termination) and provided her a hearing to respond before terminating her employment. Instead, after one attempt at forcing Plaintiff out by fabricating accusations of misconduct against her and providing her with false and libelous write ups, Defendants concocted a scheme whereby they laid her and the other [district employee] off (which was necessary because the other [employee] had less seniority [than the plaintiff]), and then created a second position specifically for [the other employee], and engaged in a sham hiring process for the new

position (with a predetermined outcome) in order to effectively fire Plaintiff and force her into early retirement. In every literal sense, Defendants denied Plaintiff due process. The processes due were notice and a hearing. The process received involved neither.'

"In essence, Plaintiff claims that Defendants laid her off for a reason other than the one Defendants gave her, and that she was entitled to notice of that 'real' reason, and an opportunity to be heard in regard to that reason. Plaintiff, however, provides no authority for this entitlement theory under procedural due process. . . ." (*Constantino*, *supra*, 2019 WL 201565 at *7–8.)

Key to the instant case, the court in *Constantino* concluded plaintiff as a matter of federal law could *not* base a section 1983 claim for deprivation of due process on allegations that her layoff was "pretextual," reasoning as follows: "Plaintiff's assertion that her layoff was 'a pretext' and that she was 'terminated' for some other, purportedly unlawful reason, is not a procedural due process claim. As Defendants argue, an employer's stated reasons for the layoff are *irrelevant* to [a] procedural due process claim; otherwise, every adverse action alleged to have been based on reasons not identified by the employer would be a due process violation, regardless of whether the stated reasons for the adverse action support the decision. [(Italics added.)] This issue is discussed in *Kay v. Haack*, No. 3:13–CV-1076–PK, 2014 WL 4220917 (D.Or. 2014) [(*Kay*)], in which the plaintiff claimed that Haack, one of his supervisors, harbored a bias against him. The court [in *Kay*] noted that it was not the supervisor, but rather the City Council who made the decision to terminate his employment. In determining that the plaintiff

received pre-termination process adequate to satisfy the requirements of procedural due process, the court held:

> [']Moreover, even assuming arguendo that Haack, acting out of bias, manipulated the evidence that the City Council considered in making its termination decision, the Fourteenth Amendment's procedural due process protections do not guarantee that in effecting a deprivation of a property interest the government act on the basis of the best evidence nor even of fairly presented evidence; the Fourteenth Amendment guarantees only notice and an opportunity to be heard by an impartial tribunal, which Kay undisputedly received in connection with his termination. *Id.* at *10–11.[']

"Because the stated reasons for Plaintiff's layoff are irrelevant to her procedural due process claim, it would be futile to allow Plaintiff to amend her complaint to include the claim of pretextual termination raised in her Opposition to the Motion to Dismiss. Further, because Plaintiff alleges that she was given notice of her pending layoff and an opportunity to be heard at the meeting, accompanied by a union representative, on March 25, 2016, she has not stated a claim of a procedural due process violation. Thus, having reviewed the parties' arguments, the court concludes that Plaintiff has failed to state a procedural due process claim in connection with being laid off by the School Board. Because amendment would be futile, the court will dismiss this claim with prejudice." (*Constantino*, *supra*, 2019 WL 201565, at *7–8.)

In *Kay*, the plaintiff, a former employee of the Vernonia Police Department, filed an action under section 1983 against various officials of the City of Vernonia (sometimes, city), including city manager Haack, the chiefs of police, a justice of the peace, and an investigator and an attorney hired by city to perform investigation-related services. (*Kay*, *supra*, 2014 WL 4220917 at * 1.) Much like plaintiff in the instant case and the plaintiff

in *Constantino*, the plaintiff in *Kay* alleged a violation of his procedural due process rights under the Fourteenth Amendment in connection with his termination of employment, "and in connection with the investigation that preceded his termination." (*Ibid.*)

Although the parties in *Kay* "offer[ed] starkly contradictory evidence bearing on several questions of fact regarding the accuracy and/or validity of the city's stated reasons for the termination of Kay's employment" (*Kay, supra*, 2014 WL 4220917 at *1), the district court nonetheless granted summary judgment in favor of the section 1983 defendants because the "accuracy and/or validity of the City's stated reasons for the termination of Kay's employment [were] *immaterial*" to that cause of action. (*Ibid.*, italics added.)

Similar to plaintiff in the instant case, there was no dispute in *Kay* that the plaintiff had a property interest in his continued employment as a city police officer. (*Kay, supra*, 2014 WL 4220917, at *8.) The issue thus became whether the plaintiff in *Kay* could show he was denied " 'adequate procedural protection.' *Krainski v. State ex rel. Bd. of Regents*, 616 F.3d 963, 970 (9th Cir.2010), citing *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998)." (*Kay*, at *8.)

The *Kay* court noted the issue of " 'what process is due' is more easily asked than answered. As the Supreme Court has frankly acknowledged, 'for all its consequence, "due process" has never been, and perhaps never can be, precisely defined.' *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24 (1981). Rather, the phrase 'expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as

its importance is lofty.' *Id.* As a result, deciphering and applying the Due Process Clause is, at best, 'an uncertain enterprise.' *Id.*" (*Kay, supra*, 2014 WL 4220917 at *8.)

Relying on *Cleveland Bd. of Education v. Loudermill* (1985) 470 U.S. 532, 536 (*Loudermill*), the court in *Kay* recognized that a pre-deprivation hearing satisfied procedural "due process requirements in the public employment context where the employee receives 'oral or written notice of the charges against him [or her], an explanation of the employer's evidence, and an opportunity to present his [or her] side of the story.' " (*Kay, supra*, at 2014 WL 4220917 at *9.) " 'To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.' [*Loudermill*, at p. 546.]" (*Kay*, at *9.)

The court in *Kay* noted the plaintiff had received written notices of the charges against him; had twice been invited to attend a pre-discipline hearing before the city council, where he would be given the opportunity to respond to the city's charges and evidence; and had availed himself of the opportunity for still more extensive post-termination process by participating in thirteen days of evidentiary hearings before a neutral arbitrator, where he presented evidence and argument. (*Kay*, *supra*, 2014 WL 4220917 at *9.) Much like the court in *Constantino*, albeit in the summary judgment context, the court in *Kay* analyzed whether, in light of the due process the city offered the plaintiff, he nonetheless could maintain an action against it because city manager Haack allegedly "harbored bias against him." (*Id.* at *10.)

In answering that question in the negative, the court in *Kay* ruled as follows: "Assuming arguendo that Kay's evidence is sufficient to create a question of fact as to

whether Haack harbored bias against him, Haack's bias is patently insufficient to create a question of fact as to the constitutional adequacy of the extensive process Kay received. It was not Haack who made the decision to terminate Kay's employment, but rather the City Council. . . . Kay offers no argument or evidence tending to suggest that the City Council shared in Haack's purported animus against him, otherwise harbored bias against him, or was in any sense other than an 'impartial tribunal.' " (*Kay*, *supra*, 2014 WL 4220917 at *10.)

As quoted in part in *Constantino*, the court in *Kay* went on to conclude that, even assuming arguendo that city manager Haack acted out of bias and manipulated the evidence against the plaintiff, as a matter of law the Fourteenth Amendment was not implicated because it did not guarantee the "government act on the basis of the best evidence nor even of fairly presented evidence" (*Kay*, *supra*, 2014 WL 4220917 at *10), but rather "guarantees only notice and an opportunity to be heard by an impartial tribunal, which Kay undisputedly received in connection with his termination." (*Ibid.*) The court thus granted summary judgment for the defendants because the plaintiff "was not deprived of his constitutional right to procedural due process in connection with his termination." (*Id.* at *11.)

2. Analysis

Turning to the instant case, plaintiff does not argue on appeal that she was deprived of due process of law by DOJ — as opposed to defendants — in connection with her termination from employment.

Indeed, the record shows the NAA specifically advised her of the right to respond to the appointing power pre-termination without being afforded an evidentiary hearing, and the right to appeal her termination to the Board for a full evidentiary hearing. (See *Loudermill*, *supra*, 470 U.S. at pp. 536–536 [concluding "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by [state] statute" in ruling the plaintiff security guard was denied due process because the board of education terminated him without giving him an opportunity to respond or otherwise challenge the action].)

As also noted, plaintiff in September 2016 availed herself of the opportunity to challenge her termination, filing an appeal to the Board alleging the NAA "was based on false information on the record that the investigator chose to present." However, on the eve of the four-day evidentiary hearing calendared by the Board, plaintiff abandoned her appeal. While it may have been her "right" to do so, as she alleges in the FAC, there is no question the appointing power afforded plaintiff all the process due her under federal law. (See *Loudermill*, *supra*, 470 U.S. at p. 536; *Constantino*, *supra*, 2019 WL 201565 at *7–8; *Kay*, *supra*, 2014 WL 4220917 at *9.)

Moreover, because DOJ afforded plaintiff all the process that was due in connection with her termination (see *Loudermill*, *supra*, 470 U.S. at p. 536), plaintiff cannot under federal law state a valid claim for due process violation based on allegations that defendants somehow were biased against her, or otherwise had an "agenda," in conducting their internal affairs investigation, which ultimately led DOJ, and *not* defendants and Flint in particular, to issue the NAA and terminate plaintiff's employment.

We find the reasoning of *Constantino* and *Kay* on this issue persuasive: if, despite being given all the process that is due, plaintiff was able to assert a procedural due process claim against defendants, then "every adverse action alleged to have been based on reasons not identified by the employer would be a due process violation, regardless of whether the stated reasons for the adverse action support the decision." (See *Constantino*, *supra*, 2019 WL 201564 at *8; see also *Kay*, *supra*, 2014 WL 4220917 at *10–11.) Because plaintiff as a matter of federal law was not deprived of her constitutional right to procedural due process in connection with her termination, we conclude the court properly sustained defendants' demurrer without leave to amend to the first cause of action in the FAC.

C. *Right to Petition*

1. Federal Law

The plaintiff in *Constantino* also alleged a First Amendment retaliation claim against the defendants based on their alleged " 'retaliation for exerting her freedom of speech and exercising her right to petition the government regarding false written reprimands.' " (*Constantino*, *supra*, 2019 WL 201565 at *9.) The court in *Constantino* analyzed this claim under the "two-step, five-factor inquiry set forth in *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009) [(*Eng*)]. The steps and factors are as follows: first, the plaintiff bears the burden of showing (1) that the speech at issue addressed a matter of public concern, (2) that the speech was spoken in the capacity of a private citizen and not a public employee, and (3) that the government took adverse employment action for which the speech at issue was a substantial or motivating factor; then, if the plaintiff has

passed the first three steps, the burden shifts to the government to show that (4) under the balancing test established by *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968) [(*Pickering*)], the government's legitimate administrative interests outweigh the employee's First Amendment rights, and (5), if the government fails the *Pickering* balancing test, it alternatively bears the burden of demonstrating that it would have taken the same employment action even in the absence of the employee's protected conduct. *Eng*, 552 F.3d at 1070–72." (*Constantino*, at *9.)

In also granting the defendants' motion to dismiss this cause of action, the court in *Constantino* ruled as follows: "Whether the speech addresses a matter of 'public concern,' as opposed to 'personal interest' for purposes of a First Amendment retaliation claim, 'is a pure question of law' for the court to decide. *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009) [(*Desrochers*)]. 'Speech that deals with individual personnel disputes and grievances' that do not bear on the public's evaluation of government functions are not matters of public concern. *Id.* (Internal quotations and citations omitted.) 'The same is true of speech that relates to internal power struggles within the workplace, and speech which is of no interest beyond the employee's bureaucratic niche.' *Id.* (Internal quotations and citations omitted.)

"Thus, the *Desrochers* court concluded that the speech at issue did not meet the 'public concern test' because the speech 'took the form of internal employee grievances which were not disseminated to the public.' See also *Turner v. City & County. of San Francisco*, 788 F.3d 1206, 1212 (9th Cir. 2015) (plaintiff did not engage in protected speech 'when he complained to his supervisors about the City's hiring and use of

temporary exempt employees'); *Nazir v. County. of Los Angeles*, No. LA CV10–06546 JAK (AGRx), 2011 WL 13217356 at *4 (C.D. Cal. Aug. 3, 2011) ('Plaintiff's complaints about promotion and reassignment are not speech involving a matter of public concern because they are centered on the personal interests of Plaintiff.')" (*Constantino, supra,* 2019 WL 201565 at *9.)

The court in *Constantino* noted the "content of the plaintiff's speech is the 'greatest single factor' in determining whether it qualifies as a matter of public concern for First Amendment purposes." (*Constantino, supra*, 2019 WL 201565 at *10, quoting *Desrochers, supra*, 572 F.3d at p. 710.) The court also noted that any speech by the plaintiff after her termination (i.e., layoff) "cannot be a part of the basis for her retaliation claim. *Desrochers*, 572 F.3d at 712 ('We look to what the employee actually said, not what [he or she] say after the fact')." (*Constantino*, at *10.) The court found the speech at issue was not a matter of public concern because it "deal[t] with individual personnel disputes and grievances." (*Id.* at * 11.)

2. Analysis

Plaintiff in the instant case alleges in her FAC that she engaged in protected speech for which she was retaliated against by "defendant Flint's intentional and unlawful termination." (FAC, ¶ 89.) Plaintiff further generally alleges such speech "addressed a matter of public concern, i.e., recurring government misconduct in prosecutions." (*Id.*, ¶ 90.)

Despite plaintiff's general conclusions of fact or law and otherwise improper allegations to the contrary (see *Yvanova, supra,* 62 Cal.4th at p. 924), we conclude the

speech at issue here — the filing of the writ petition in July 2016 and her "assertions to individuals in the DA's office . . . [of her] intent on vindicating her rights via a lawsuit for wrongful prosecution against the DA" (FAC, ¶ 90) — does not qualify under federal law as a matter of public concern. (See *Desrochers*, *supra*, 572 F.3d at p. 709; *Constantino*, *supra*, 2019 WL 201565 at *11.)

First, as evidenced by the allegations in plaintiff's FAC, DOJ launched the internal affairs investigation of plaintiff in early January 2015 (FAC, ¶ 27), while plaintiff was out on medical leave, or about a year and a half *before* plaintiff filed her writ petition in late July 2016. Plaintiff's allegation that defendants retaliated against her *as a result* of her filing the writ petition is thus belied by other allegations in the FAC and by facts judicially noticed. (See *Barnett*, *supra*, 90 Cal.App.4th at p. 505 [recognizing that, to the extent allegations in a complaint conflict with the contents of an exhibit attached thereto or to matters judicially noticed, a court may ignore the conflicting allegations and treat as true the contents of the exhibit or judicially noticed facts].)

Second, as demonstrated by the NAA, defendants' investigation of plaintiff, and DOJ's decision ultimately to terminate her, were not based solely on plaintiff's 2003 conviction, despite her improper allegations stating otherwise. (FAC, ¶ 58 ["The reason plaintiff's conviction is the centerpiece of the adverse action is that ultimately defendant Flint rejected the ALJ's recommendation for reinstatement, based on her misdemeanor conviction, despite the fact that the conviction was remote in time, i.e., almost 13 years, and was an insignificant misdemeanor conviction for which no time was served"].) (See *Yvanova*, *supra*, 62 Cal.4th at p. 924.)

Indeed, the NAA sets forth multiple *other* grounds in section 19572 to support DOJ's decision to terminate plaintiff's employment, including: (c) inefficiency; (d) inexcusable neglect of duty; (e) insubordination; (f) dishonesty; (o) willful disobedience; (p) misuse of state property; (r) violations of the prohibitions in section 19990, including "[u]sing state time, facilities, equipment or supplies for private gain or advantage" and "not devoting . . . her full time, attention, and efforts to . . . her state office or employment during . . . her hours of duty as a state officer or employee"; and (t) "failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority."

Third, the alleged protected speech at issue involved what plaintiff herself described in the FAC as "an insignificant misdemeanor conviction" that occurred "almost 13 years" earlier. (FAC, ¶ 58.) To the extent such speech may have involved an issue of public concern in 2003, or perhaps in 2010 when an internal affairs investigation against DDA Marugg began as a result of his having "inappropriate relationships with former defendants" he prosecuted (*id.*, ¶ 14), we independently conclude that plaintiff's prosecution in 2003 was no longer an issue of public concern in July 2016, when she filed her writ petition in response to what she alleged was a "harassing" year-and-a-half-long investigation of her by defendants (FAC, ¶ 84), and just *days* before she was served with the NAA. (See *Constantino*, *supra*, 2019 WL 201565 at *9.)

Fourth, plaintiff was given ample opportunity to petition the government, as she has had "extensive access to administrative procedures and to the courts," as also noted by the trial court. Plaintiff in her FAC alleges she filed in January 2007 a petition to expunge her 2003 misdemeanor conviction. (FAC, ¶ 12.) As also noted, plaintiff contemplated filing a federal lawsuit for wrongful prosecution. And of course, she also filed her writ petition and was afforded the opportunity to challenge her termination through various administrative procedures, including to the appointing power and to the Board. For this additional reason, we conclude plaintiff's second cause of action fails as a matter of law.[9]

II

Leave to Amend

Finally, we consider whether the trial court should have granted plaintiff leave to amend the FAC. When a trial court sustains a demurrer without leave to amend such as in the instant case, "we must decide whether there is a reasonable possibility the plaintiff

---

[9] In light of our decision, we decline to address other arguments raised by defendants including that plaintiff was precluded from asserting her second cause of action for First Amendment retaliation because she failed to seek leave to do so after the court sustained defendants' demurrer to her original complaint with leave to amend (see e.g., *People ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 785 [noting absent an express statement of leave by the trial court to add entirely new causes of action, when a demurrer is sustained with leave to amend leave is properly construed as permission to amend the causes of action as to which the demurrer was sustained]); or that plaintiff forfeited any issue regarding this particular cause of action because she did not provide any argument and legal authority in her opening brief to establish error in connection with defendants' demurrer. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*) [noting a party that "fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority," forfeits that point or issue on appeal].)

could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).)

Here, as defendants point out, plaintiff has provided no discussion in her opening brief of possible amendments to the FAC that would rectify the defects in it.[10] Plaintiff also did not request leave to amend in the trial court, as the court so noted after it sustained defendants' demurrer to the FAC without leave to amend. Because it was plaintiff's burden to show that "an amendment would cure the defect" (see *Schifando*, *supra*, 31 Cal.4th at p. 1081), and because she did not even attempt to satisfy this burden either in the trial court or on appeal (see *Cahill*, *supra*, 194 Cal.App.4th at p. 956 [reciting the rules regarding forfeiture of an issue on appeal]), we conclude the trial court properly exercised its discretion in sustaining the demurrer to the FAC *without* leave to amend.

---

10 Plaintiff did not file a reply brief.

DISPOSITION

The judgment for defendants is affirmed. Defendants to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.